

Public Comments for WPIC reports/bills

Thank you to the WPIC committee, subcommittee and Corina Hach, drafter, for the work on this matter. I am submitting the following with regard to PD 0009

An Act Amending the Process for Water [sic] Right Ownership Updates; Amending the Penalty for Noncompliance; and Amending Sections 85-2-424 and 85-2-431, MCA.

By the definitions found in 85-2-102 "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33. As this is a defined term, references within this proposed bill to department should be instead to Department. It may make it may clarify while reading with the multiple jumps between department (DNRC) and department of revenue, which can result in confusion as to which department is doing what.

85-2-424 (2) (a)

Suggestion: If the realty transfer certificate or another instrument discloses that the water rights will transfer with the property, the . . . Department shall update its records to reflect the new ownership of the water right between the identified transferor and transferee only, within 30 days of receipt of either:

- (i) information received from the department of revenue if:
 - (A) the transferor of the property is the same as the owner of record for the water rights found in the Department records; and
 - (B) the transferor conveys the entirety of the property associated with the place of use to the transferee; or
- (ii) **Suggestion:** an appropriate ownership update form, determined correct and complete by the Department, is submitted to the Department by the transferor or transferee, with a copy of the recorded deed or deeds together with any other instrument confirming the transferee's ownership of each water right listed on the form, and the required fees. (Original draft version, I assume department as written is referencing the DNRC in both instances, but confusing when following the provision that information is received from the DoR).
- (b) **Suggestion:** If the transferor of the property is not the same as the owner of record for the water right(s) found in the Department records, the Department shall notify the transferee of any defects in an ownership update within 90 days of submission. If the defect is in regard to the ownership of record for the water right, the notice shall request a chain of conveyance of the water right from the owner of record to the transferee. If chain of conveyance is not provided the Department may assess a penalty against the transferee pursuant to 85-2-431 and the Department shall confirm chain of conveyance of the water right from the owner of record to the transferee.

This is a good addition, but requires the DNRC confirm the chain of title, first and then notify the transferee. Seems more logical that the department would first send notice to the transferee of any defects in an ownership update within 90 days, and the notice would include, if appropriate, a request for confirmation of the chain of conveyance. Would suggest that the notice be sent to both the Transferor and Transferee, so that both are on notice, removing the burden from the DNRC, and the DNRC request the chain of conveyance from both. If not received - \$200 fine.

- (c) If moved to (d), it would put this fee provision in consecutive order with (e) which is a fee provision with regards to the Department receiving the fees.
- (d) If moved to (c), it would put this notice provision in consecutive order with the notice being sent by the DNRC to the transferee.
- (e) Current: If the Department receives notice from the department of revenue that a property transfer has occurred and the proper fee was not received by the Department (which department?), the Department shall send notice to the transferee requesting payment of the fee. If the transferee does not pay the fee within 60 days, the Department may assess a penalty against the transferee pursuant to 85-2-431.

Suggestion: If the department of revenue sends notice to the Department that a property transfer has occurred and the Department determines the proper fee was not received, the Department shall send notice to the transferee requesting payment of the fee. If the transferee does not pay the fee within 60 days, the Department may assess a penalty against the transferee pursuant to 85-2-431.

(3) (a) **Suggestion:** Except as provided in subsection (3)(b), if the realty transfer certificate discloses the division of the place of use appurtenant to a water right into separate parcels (*the division of the place of use is not being made among separate parcels, the appurtenant water right is being split among separate parcels*) each transferee receiving a portion of the appurtenant water right shall complete and file with the Department a water right ownership update form, a map, a copy of the deed or other instrument confirming the transfer, and the required fee.

(The DNRC does not receive the RTC from the DoR or the party to the transaction, so it is problematic that DNRC is 'changing in the dark' without knowing exactly what the RTC is disclosing, and are thus relying on information received from a third party. What burden does the owner retaining a portion of the water right have in this situation - are they also a transferee because they are retaining a portion of the water right?)

(4) **Suggestion:** If an owner of record with the Department exempts a water right pursuant to 85-2-403, the owner shall file with the Department, on an appropriate Department form, the exemption information for the water right, any deed or other instrument evidencing the exemption, and the required fee.

(5) **Suggestion:** If an owner of record with the Department severs a water right from appurtenant property without conveying the property, the owner shall file with the Department, on an appropriate Department form, the severance information, any deed or other instrument evidencing the severance, and the required fee.

(8) (c) **Suggestion:** learning of a clerical or Department error on a water right ownership update.

9 (a) and (b) appear to be two separate issues and might be clearer if under two separate ¶ #'s.

New (9) **Suggestion:** In the event of a dispute over the ownership of a water right, the Department shall, within 30 days of being notified of the dispute:

- (a) certify the matter to the water court for resolution, if the controversy involves an existing water right as defined in 85-2-102; or
- (b) certify the matter to the Department hearing examiner for determination of ownership, if the controversy involves a permit issued by the Department. The hearing's examiner's decision regarding ownership may be appealed to a court of competent jurisdiction, where it will be subject to de novo review.

New (10) **Suggestion:** The Department shall update its records to add or remove a party from the list of owners of a water right within 30 days of receiving an Order from a Court of Competent Jurisdiction or Department hearing examiner.

Rerum (10) to (11) The Department may not delay updating ownership based on non-payment of transfer fees by a transferee. The Department's sole remedy in the event of non-payment of transfer fees is to assess a penalty and seek collection from the transferee pursuant to 85-2-431.

Section 2.

(2) **Suggestion:** An action to recover the penalty must be brought by the Department and filed in the First Judicial District Court, Lewis and Clark County. The Department shall certify the judgment to the District Court in the county where the real property is located.

(This should not be discretionary, it makes no sense to get the judgment and leave it sitting in a jurisdiction that will not lead to collection of the fees and costs if the property were to sell)

(The understanding from hearing testimony is the DNRC does not receive the RTC or the deed from the Department of Revenue. This bill is still in part premised on DNRC moving forward with changes to ownership without receiving these documents from the DoR or the parties. If the DoR information is used to update ownership, in any way, DNRC must receive both the deed and the RTC from the DoR, in order to avoid an ongoing issue of adding foreign owners to water rights. The ownership changes must be restricted to only the parties to the transaction leading to the water right transfer (transferor/transferee), and if the ownership is in error in the DNRC

records, it needs to be corrected by chain of title, not by a DoR notice.)

With regard to the forms:

DNRC Form 608, and maybe others, should be amended to remove the provision in ¶ 4 which provides the following:

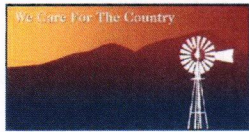
IF NO DEED IS ATTACHED, DNRC WILL WAIT FOR TRANSFER INFORMATION FROM DEPARTMENT OF REVENUE TO PROCESS THE UPDATE

Having this provision in there leaves the door open to give practitioners and transferees the easy way out and keeping the burden on the DNRC to try to accurately change ownership. The provision also leaves the DoR information, without supporting documentation, as the controlling means of conveyance of water rights.

Thank you for your time and consideration.

Sincerely,

Jean Bergeson



**MONTANA
FARM BUREAU
FEDERATION**

502 S. 19th Ave, Suite 104
Bozeman, MT 59718

We Care For The Country

September 3, 2020

Water Policy Interim Committee
P.O. Box 201704
Helena, MT 59620-1704

RE: PD 0009 Ownership Update Draft Public Comment

To whom it may concern,

The Montana Farm Bureau is a grassroots organization dedicated to preserving and improving the agriculture and natural resource industries through member involvement in education, political activities, programs and services. We represent our membership on all facets of agriculture.

The Montana Farm Bureau Federation would like to take this opportunity to comment on the Water Policy Interim Committee's legislation on water right ownerships updates, PD0009.

The Montana Farm Bureau is a member of the Senior Water Rights Coalition and is in support of the amended bill draft that was submitted by them. Ownership updates for water rights is incredibly import for all water users, especially as water rights change ownership. A clear transfer with knowledge of the seller and buyer is crucial. An accurate database with correct record keeping will also help to outline the issues faced with geocode overlap.

MFBF does support the amended bill and looks forward to seeing the discussion on this subject progress and MFBF will continue to work as a part of the Senior Water Rights Coalition and other parties to complete this.

Montana Farm Bureau Federation does recommend that the WPIC moves forward with the SrWRC amended bill.

Thank you for your time,

Rachel Cone

Montana Farm Bureau Federation

State Government Affairs

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As of: 2020/07/08 05:43:01

Drafter: Corina Hach, 406-444-4026

67th Legislature

PD 0009

**** BILL NO. ****

INTRODUCED BY ****

BY REQUEST OF THE ****

A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING THE PROCESS FOR WATE RIGHT OWNERSHIP
UPDATES; AMENDING THE PENALTY FOR NONCOMPLIANCE; AND AMENDING SECTIONS 85-2-424
AND 85-2-431, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-424, MCA, is amended to read:

"85-2-424. Filing. (1) Except in the case of a transfer of real property served by a public service water supply, when a person presents for recording a deed or other instrument evidencing a transfer of real property, the realty transfer certificate must contain a water rights disclosure in which the transferor shall acknowledge, at or before closing or transfer of real property, whether or not any water rights are associated with the property to be transferred and whether or not any water rights will transfer with the real property.

(2) (a) ~~If the realty transfer certificate or another instrument discloses that the water rights will transfer with the property, the department's records must be updated~~ The department shall update its records to reflect the ~~purchaser of the property as the new owner~~ship of the water right ~~based on~~within 30 days of receipt of either:

(i) information received from the department of revenue if:

(A) the transferor of the property is the same as the owner of record for the water rights;

and

(B) the transferor conveys the entirety of the property associated with the place of use; or

and

(C) the department has not received a form pursuant to subsections (3), (4), or (5) of this section; or

(ii) ~~an a correct and complete~~ ownership update form provided by the department and submitted to the

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department ~~with a copy of the recorded deed or deeds together with any other instrument confirming the transferee's ownership of each water right listed on the form.~~

~~(b) If the transferor of the property is not the same as the owner of record for the water rights, the department shall confirm chain of conveyance of the water right from the owner of record to the transferee. The department shall notify the transferee of any defects in an ownership update within 90 days of submission. If the department receives information from the department of revenue that a transfer has occurred and the transferor of the property is not the same as the owner of record for the water rights, the department shall within 30 days of receipt of the information from the department of revenue notify each party indicated as a transferee that:~~

~~(i) the party is required to submit a complete ownership update form and the required fee within 60 days of the notice; and~~

~~(ii) ownership of the water right will not be changed in the department's records until the complete ownership update form is provided.~~

~~(b)(c)~~ The appropriate fee must be paid at closing or upon completion of the transfer of real property as provided in 85-2-426.

~~(e)(d)~~ The transferee of a water right, after receiving notice as provided in subsection ~~(2)(d)~~ (2)(e), is responsible for compliance with this section.

~~(d)(e)~~ If the department receives notice from the department of revenue that a property transfer has occurred and the proper fee was not received by the department, the department shall send a notice to the transferee requesting payment of the fee. If the transferee does not pay the fee within 60 days, the department may assess a penalty against the transferee pursuant to 85-2-431.

~~(f) The department shall adopt rules that are necessary to determine whether an ownership update is correct and complete.~~

(3) (a) Except as provided in subsection (3)(b), if the realty transfer certificate discloses the division of the place of use of a water right among separate parcels, ~~the person dividing each transferee receiving a portion of~~ the water right shall ~~complete and~~ file with the department a complete water right ownership update form, a map, a copy of the deed or deeds or any other instruments confirming the transfer, and the required fee.

(b) If a complete water right update-ownership update form is not filed by all parties pursuant to

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PD 0009

subsection (3)(a), the owners must be reflected as co-owners on the water right.

(4) If a person exempts a water right pursuant to 85-2-403, the person shall file with the department, ~~on a complete~~ form provided by the department, ~~information~~ describing the exempting of the water right and the appropriate fee.

(5) If a person severs a water right from appurtenant property without ~~selling~~ conveying the property, the person shall file with the department, ~~on a complete~~ form provided by the department, ~~information~~ describing the severance, ~~any deed or other instrument evidencing the severance,~~ and the appropriate fee.

(6) If the realty transfer certificate submitted with a deed or other instrument indicates that a water right is being transferred, severed, divided, or exempted (reserved), the clerk and recorder may not record the deed or instrument unless there is submitted with the deed or instrument a certification under penalty of false swearing, on a form provided by the department and signed by the transferor and transferee, that states either:

(a) that the documents and fee necessary to comply with this section are held in escrow, in which case the certification must also be signed by the escrow agent; or

(b) if there is no escrow, that the transferor and transferee certify that they have prepared-filed or mailed the required documents ~~and will send the required documents~~ and fee with or to the department ~~within 60 business days of recording, in which case the certification must also require the transferee to acknowledge that failure to file the appropriate documents and fee with the department will result in the department assessing the penalty in 85-2-431 against the transferee.~~

(7) Any written agreement to transfer land that has appurtenant water rights on record with the department must contain the following disclosure or words of a similar nature:

"WATER RIGHT OWNERSHIP UPDATE DISCLOSURE:

By Montana law, failure of the parties at closing or transfer of real property to pay the required fee to the Montana Department of Natural Resources and Conservation for updating water right ownership may result in the transferee of the property being subject to a penalty. Additionally, in the case of water rights being exempted, severed, or divided, the failure of the parties to comply with section 85-2-424, MCA, could result in a penalty against the transferee and rejection of the deed for recording."

(8) The department shall update its records to reflect new ownership without collection of a transfer fee within 30 days of:

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1 (a) receiving a withdrawal of a water right, or an interest in a water right, by an owner thereof in a
2 circumstance not subject to subsection (2);

3 (b) receiving an order from the water court or other court of competent jurisdiction that modifies or
4 terminates ownership of a water right; or

5 (c) learning of a clerical error resulting from an error on a water right ownership update.

6 (9) (a) The department shall update its records to add or remove a party from the list of owners of a
7 water right within 30 days of receiving an order from a-the water court or other court of competent jurisdiction-or
8 department hearing examiner.

9 (b) In the event of a dispute over the ownership of a water right, the department shall, within 30 days of
10 being notified of the dispute:

11 (i), certify the matter to the water court or other court of competent jurisdiction for resolution, if the
12 controversy involves an existing water right as defined in 85-2-102; or

13 (ii) certify the matter to the department hearing examiner for determination of ownership, if the
14 controversy involves a permit issued by the department. The hearing examiner's decision regarding
15 ownership may be appealed to a court of competent jurisdiction, where it will be subject to de novo
16 review.

17 (10) The department may not delay updating ownership based on non-payment of transfer fees by a
18 transferee. The department's sole remedy in the event of non-payment of transfer fees is to assess a
19 penalty and seek collection from the transferee pursuant to 85-2-431."

20 (11) For the purposes of this section, "complete" means that the information requested in the form has
21 been supplied together with a copy of the executed deed or deeds or any other instruments confirming
22 the transferee's ownership of each water right listed on the form. The department shall notify the
23 transferee of any deficiencies causing the form to be deemed not complete within 60 days of
24 submission."

25
26 **Section 2.** Section 85-2-431, MCA, is amended to read:

27 **"85-2-431. Penalty.** (1) A person who fails to comply with the requirements of 85-2-424 is liable for a
28 civil penalty of not more than ~~\$75~~ \$200.

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(2) An action to recover the penalty must be brought by the department and filed in the district court for the first judicial district. At the discretion of the department, the judgment may be certified to the district court in the county where the real property is located.

(3) The department is entitled to recover its reasonable costs for recovering the penalty, including but not limited to attorney fees or charges assessed by a collection agency.

(3)(4) Any penalty fee collected under this section must be deposited in the water right appropriation account provided for in 85-2-318."

- END -



Senior Water Rights Coalition

PO Box 7325

Helena, MT 59604

(406) 439-2215

To: Water Policy Interim Committee

From: Krista Lee Evans, Senior Water Rights Coalition

RE: PD 0009 Ownership Update Draft Public Comment

Date: September 2, 2020

The Senior Water Rights Coalition is a coalition of senior water right holders including irrigators, stock water users, and hydropower facilities. The Senior Water Rights Coalition works to protect the property rights of senior water right holders in Montana.

SrWRC appreciates the opportunity to provide public comment on the draft WPIC study addressing the proposed "ownership update" legislation – PD 0009.

SrWRC has worked with other interested parties to try to come to a consensus on amendments to the water right ownership update process. The result of these meetings is attached in the form of an amended bill draft. Our primary goal in working on this legislation was to (1) make every effort to ensure that the water rights database is as accurate as possible so that proper public notice is given on water rights issues, (2) eliminate owners being erroneously added to water rights because of a geocode overlap, and (3) provide a process to follow when a conflict arises regarding ownership of a water right.

We support the attached amended bill draft while recognizing that there may be concerns from other parties who were not part of the discussion. SrWRC is committed to continuing to work on this issue, as necessary, to develop legislation that improves the ownership update process in a way that is efficient and effective.

SrWRC urges WPIC to move forward with the amended bill draft as a committee bill for consideration by the Legislature.

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As of: 2020/07/21 03:48:42

Drafter: Corina Hach, 406-444-4026

67th Legislature

PD 0011

**** BILL NO. ****

INTRODUCED BY ****

BY REQUEST OF THE ****

A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING THE PROCESS FOR WATE RIGHT OWNERSHIP
UPDATES; AMENDING THE PENALTY FOR NONCOMPLIANCE; AND AMENDING SECTIONS 85-2-424
AND 85-2-431, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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"85-2-424. Filing. (1) Except in the case of a transfer of real property served by a public service water supply, when a person presents for recording a deed or other instrument evidencing a transfer of real property, the realty transfer certificate must contain a water rights disclosure in which the transferor shall acknowledge, at or before closing or transfer of real property, whether or not any water rights are associated with the property to be transferred and whether or not any water rights will transfer with the real property.

(2) (a) The department shall update its records to reflect the new ownership of the water right within 30 days of receipt of either:

(i) information received from the department of revenue if:

(A) the transferor of the property is the same as the owner of record for the water rights;

(B) the transferor conveys the entirety of the property associated with the place of use; and

(C) the department has not received a form pursuant to subsections (3), (4), or (5) of this

section; or

(ii) a complete ownership update form provided by the department and submitted to the department.

(b) If the department receives information from the department of revenue that a transfer has occurred and the transferor of the property is not the same as the owner of record for the water rights, the department shall within 30 days of receipt of the information from the department of revenue notify each party indicated as a transferee that:

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(i) the party is required to submit a complete ownership update form and the required fee within 60 days of the notice; and

(ii) ownership of the water right will not be changed in the department's records until the complete ownership update form is provided.

(c) The appropriate fee must be paid at closing or upon completion of the transfer of real property as provided in 85-2-426.

(d) The transferee of a water right, after receiving notice as provided in subsection (2)(e), is responsible for compliance with this section.

(e) If the department receives notice from the department of revenue that a property transfer has occurred and the proper fee was not received by the department, the department shall send a notice to the transferee requesting payment of the fee. If the transferee does not pay the fee within 60 days, the department may assess a penalty against the transferee pursuant to 85-2-431.

(3) (a) Except as provided in subsection (3)(b), if the realty transfer certificate discloses the division of the place of use of a water right among separate parcels, each transferee receiving a portion of the water right shall file with the department a complete water right ownership update form, a map, a copy of recorded deed or deeds or any other instruments confirming the transfer, and the required fee.

(b) If a complete water right ownership update form is not filed by all parties pursuant to subsection (3)(a), the owners must be reflected as co-owners on the water right.

(4) If a person exempts a water right pursuant to 85-2-403, the person shall file with the department a complete form provided by the department describing the exempting of the water right and the appropriate fee.

(5) If a person severs a water right from appurtenant property without conveying the property, the person shall file with the department a complete form provided by the department describing the severance and the appropriate fee.

(6) If the realty transfer certificate submitted with a deed or other instrument indicates that a water right is being transferred, severed, divided, or exempted(reserved), the clerk and recorder may not record the deed or instrument unless there is submitted with the deed or instrument a certification under penalty of false swearing, on a form provided by the department and signed by the transferor and transferee, that states either:

(a) that the documents and fee necessary to comply with this section are held in escrow, in which

1 case the certification must also be signed by the escrow agent; or

2 (b) if there is no escrow, that the transferor and transferee certify that they have filed or mailed the
3 required documents and fee with or to the department.

4 (7) Any written agreement to transfer land that has appurtenant water rights on record with the
5 department must contain the following disclosure or words of a similar nature:

6 "WATER RIGHT OWNERSHIP UPDATE DISCLOSURE:

7 By Montana law, failure of the parties at closing or transfer of real property to pay the required fee to
8 the Montana Department of Natural Resources and Conservation for updating water right ownership may result
9 in the transferee of the property being subject to a penalty. Additionally, in the case of water rights being
10 exempted, severed, or divided, the failure of the parties to comply with section 85-2-424, MCA, could result in a
11 penalty against the transferee and rejection of the deed for recording."

12 (8) The department shall update its records to reflect new ownership without collection of a transfer
13 fee within 30 days of:

14 (a) receiving a withdrawal of a water right, or an interest in a water right, by an owner thereof in a
15 circumstance not subject to subsection (2);

16 (b) receiving an order from the water court that modifies or terminates ownership of a water right; or

17 (c) learning of a clerical error resulting from an error on a water right ownership update.

18 (9) (a) The department shall update its records to add or remove a party from the list of owners of a
19 water right within 30 days of receiving an order from a court of competent jurisdiction.

20 (b) In the event of a dispute over the ownership of a water right, the department shall, within 30 days of
21 being notified of the dispute, certify the matter to the water court or other court of competent jurisdiction
22 for resolution.

23 (10) The department may not delay updating ownership based on non-payment of transfer fees by a
24 transferee. The department's sole remedy in the event of non-payment of transfer fees is to assess a
25 penalty and seek collection from the transferee pursuant to 85-2-431.

26 (11) For the purposes of this section, "complete" means that the information requested in the form has
27 been supplied together with a copy of the **executed** deed or deeds or any other instruments confirming
28 the transferee's ownership of each water right listed on the form. The department shall notify the

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transferee of any deficiencies causing the form to be deemed not complete within 60 days of submission."

Section 2. Section 85-2-431, MCA, is amended to read:

"85-2-431. Penalty. (1) A person who fails to comply with the requirements of 85-2-424 is liable for a civil penalty of not more than \$200.

(2) An action to recover the penalty must be brought by the department and filed in the district court for the first judicial district. At the discretion of the department, the judgment may be certified to the district court in the county where the real property is located.

(3) The department is entitled to recover its reasonable costs for recovering the penalty, including but not limited to attorney fees or charges assessed by a collection agency.

(4) Any penalty fee collected under this section must be deposited in the water right appropriation account provided for in 85-2-318."

- END -